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E THE ARIZONA CORPORATION COMMISSION

**CARL J. KUNASEK**  
Chairman  
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Commissioner  
**WILLIAM A. MUNDELL**  
Commissioner

2000 APR 13 Arizona Corporation Commission

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**IN THE MATTER OF THE COMPLAINT  
OF AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC. AGAINST  
U S WEST COMMUNICATIONS, INC.  
REGARDING ACCESS SERVICE**

**DOCKET NO. T-02428A-99-0476  
T-01051B-99-0476**

**AT&T'S RESPONSE TO U S WEST'S  
RENEWED MOTION TO STAY**

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby responds to U S WEST Communications, Inc.'s ("U S WEST") Renewed Motion to Stay Proceeding Pending FCC Determination of U S WEST's Petition for Declaratory Ruling, or Alternative Motion to Sever. For the reasons set forth herein, U S WEST's Motion should be denied.

# **I. BACKGROUND**

U S WEST's Renewed Motion to Stay is the third attempt by U S WEST to prevent the Arizona Corporation Commission from hearing AT&T's claims that U S WEST provides inadequate, unreasonable and unjust access facilities and discriminates between classes and locations of customers. It is also another attempt to limit the scope of the evidence to downplay the seriousness of the problem.

The first pleading filed by U S WEST was its Motion for More Definitive Statement, Motion for Extension, and in the Alternative, Motion for Partial Summary Judgment. U S WEST made the same legal arguments it makes in its Renewed Motion for Stay. U S WEST's Motion for Summary Judgment was denied; its Motion for More Definitive Statement was granted, in part. More importantly, the Hearing Officer ruled that "[t]he filed

rate doctrine does not preempt the Commission's jurisdiction in this matter." *Procedural Order* at 3 (Oct. 20, 1999).

On December 17, 1999, U S WEST filed a Motion to Stay Proceeding Pending FCC Decision on FCC Preemption, or in the Alternative, to Sever Claims Relating to Interstate Services. U S WEST did not raise any legal arguments that it had not raised in its prior Motion. The basis of U S WEST's Motion was a Petition for Declaratory Ruling that it had filed with the Federal Communications Commission ("FCC") on December 15, 1999. Once again, the Hearing Officer ruled that "[t]he filed rate doctrine does not preempt the Commission's jurisdiction in this matter." *Procedural Order* at 3 (Jan. 31, 2000). The Hearing Officer concluded that "[a]bsent clear federal preemption, we will not yield our jurisdiction over AT&T's Complaint. The Hearing Officer did not sever any "claims relating to interstate service."

Therefore, the law of the case is that the filed rate doctrine does not preempt the Commission's jurisdiction, and all claims raised by AT&T should be heard by the Commission.

## II. ARGUMENTS

U S WEST's Renewed Motion raises the same legal arguments that were raised in its first two motions, refuted by AT&T, and denied by the Hearing Officer. AT&T, therefore, relies on its responses to the previous two motions to respond to U S WEST's Renewed Motion to Compel, or in the Alternative, Motion to Sever, and incorporates its responses herein by reference. *See* Attachments A and B.

U S WEST raises two new arguments: one, the FCC has established a pleading cycle for comments on U S WEST's petition before the FCC; and, two, the Colorado Commission has stayed the Colorado access complaint proceeding pending an FCC determination.

It may be useful to respond to the Colorado decision first. It should be pointed out that the Colorado Administrative Law Judge ("ALJ") made a number of findings of fact that U S WEST omitted from its Motion.

- D. AT&T has experienced regular, frequent, widespread, and ongoing delays in obtaining access purchased out of the federal tariff. AT&T has experienced delays in three instances with orders for access under the State catalog. Sometimes U S WEST will provide a date upon which service is to be provided, but extend that date once or repeatedly with little or no warning to AT&T. Or, U S WEST may establish a date on which service is to be provided but later simply cancel that date and not provide a new date. While there is an expedited process available through the tariff, for an increased charge, AT&T has little control over the date that access ordered in the normal course of events will be provided.
- E. Orders are deemed to be held orders when facilities are not in place to provide the service. U S WEST has put held status on many orders submitted by AT&T within the recent past. Many other orders have simply not been filled on the date originally promised.
- F. When U S WEST does not meet its dates for the provision of service, it works a hardship on AT&T as well as AT&T's customers. AT&T is held responsible by the ultimate end user which puts AT&T in a poor business light. Also, the end user does not obtain the service when requested or needed. In an attempt to reduce the frequency with which this occurs, AT&T has requested information from U S WEST concerning "hotspots" or areas in the network which are nearing capacity. AT&T has sought this information generally, and also for areas where it has forecasted a demand, in order to be able to better coordinate its business with the ability of U S WEST to provision services. However, U S WEST refuses to provide information of this type.
- G. On a region-wide, multi-state basis, U S WEST has provisioned DS1s and DS0s to AT&T on a wholesale basis after a longer interval than it provided those same services to other wholesale customers. In

addition, the provision of these circuits to AT&T takes longer than it does to provision these circuits to U S WEST retail sales on a region-wide, multi-state basis.

Thus, the ALJ determined that many of AT&T's allegations in its Colorado access complaint were true. The same allegations have been made by AT&T in Arizona. The importance of the Colorado ALJ decision then, boils down to whether U S WEST's current inadequate, unjust and unreasonable practices should be allowed continue pending some ultimate decision by the FCC to take *exclusive jurisdiction* and preempt the states. The ALJ in Colorado may believe so. However, the ALJ in Colorado should not be permitted to decide if Arizona customer continue to receive inadequate, unjust and unreasonable services.

The response to U S WEST's argument that this Commission should stay this proceeding until the FCC rules on U S WEST's Petition for Declaratory Ruling is similar -- should this Commission wait for the comment period at the FCC to expire and wait for a ruling from the FCC that it is not preempted before it proceeds. The Hearing Officer ruled the Commission will not yield: "Absent clear federal preemption, we will not yield our jurisdiction over AT&T's Complaint." *Procedural Order* at 3 (Jan. 3, 2000). U S WEST would have its current practices continue during the period the FCC takes to render a decision on U S WEST's petition at the FCC. *This could take years.*

U S WEST also fails to acknowledge the claims of AT&T that U S WEST fails to comply with its state obligations under U S WEST Service Quality Plan tariff. AT&T also has raised claims that U S WEST is discriminating against classes of customers and certain localities in Arizona in violation of state statutes. U S WEST fails to acknowledge that the facilities are used to provide intrastate and interstate services, and are inadequate no matter what tariff the access service is ordered from.

### III. CONCLUSION

This case is not just about the 93 held orders. It is about U S WEST's continuing practices. It is about U S WEST's failure to provide adequate, just and reasonable access facilities. It is about discrimination against various class of customers and locations in Arizona. All these allegations involve violations of state tariffs and statutes. All the facilities involved are used to provide intrastate services to Arizona customers.

When will U S WEST be required to comply with its tariffs and the law? U S WEST has every incentive to delay this proceeding. AT&T wants to provide adequate service to its Arizona customers, but must rely on U S WEST's inadequate facilities. Not only is the law on AT&T's side, so are the equities.

AT&T respectfully requests that U S WEST's Motion for Renewed Stay or Alternative Motion to Sever, be denied.

Respectfully submitted this 12<sup>th</sup> day of April, 2000.

**AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC.**

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# **ATTACHMENT A**

BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK  
Chairman  
JAMES M. IRVIN  
Commissioner  
WILLIAM A. MUNDELL  
Commissioner

IN THE MATTER OF THE COMPLAINT OF )	DOCKET NO.	T-02428A-99-0476
AT&T COMMUNICATIONS OF THE )		T-01051B-99-0476
MOUNTAIN STATES, INC. AGAINST )		
U S WEST COMMUNICATIONS, INC. )	AT&T'S RESPONSE TO U S	
REGARDING ACCESS SERVICE )	WEST'S MOTION FOR MORE	
)	DEFINITIVE STATEMENT,	
)	MOTION FOR EXTENSION, AND	
)	IN THE ALTERNATIVE, MOTION	
)	FOR PARTIAL SUMMARY	
)	JUDGMENT	

AT&T Communications of the Mountain States, Inc. ("AT&T") submits its response to U S WEST Communications, Inc.'s ("U S WEST") motion for a more definitive statement, motion for extension and, in the alternative, motion for partial summary judgment ("Motion").

U S WEST's Motion is without merit and should be denied.

**I. INTRODUCTION**

U S WEST's Motion purports to raise a jurisdictional issue in an effort to significantly curtail the Arizona Corporation Commission's ("Commission" or "ACC") consideration of matters which are subject to Commission review under Arizona law. U S WEST's arguments ignore three undisputed factors. First, U S WEST's Service Quality Plan tariff, and the Commission's approval of that tariff, recognizes this Commission's jurisdiction over the interoffice facilities at issue in AT&T's Complaint. See U S WEST's Service Quality Plan tariff, § 2.5.4. Second, U S WEST's Motion concedes the Commission has some jurisdiction over the issues raised in AT&T's Complaint, making dismissal unwarranted. Third, the fundamental issue in this proceeding is that Arizona consumers are being denied access to telecommunications services based upon

U S WEST's unlawful and discriminatory actions in violation of Arizona statutes and U S WEST's Service Quality Plan tariff, which are clearly within the Commission's jurisdiction to investigate and enforce. U S WEST's attempt to summarily limit this proceeding at this juncture should be rejected. The scope of the Commission's authority to award AT&T its relief will be more fully developed through the record in this proceeding, but this in no way limits the Commission's jurisdiction and constitutional duty to proceed with AT&T's Complaint. A.R.S. Const. Art. 15, § 3.

## **II. BACKGROUND FACTS**

In this proceeding, AT&T has clearly and specifically alleged that U S WEST has violated and continues to violate numerous Arizona statutes and U S WEST's Service Quality Plan tariff by failing to provide facilities necessary for access service, by failing to timely provision the facilities it eventually provides, and by favoring itself, its affiliates, and its own customers and certain communities in deciding where to provision facilities. In the current Complaint, AT&T has detailed the long history of this unfair and discriminatory treatment by U S WEST in the provision of both dedicated and switched access services. In fact, AT&T filed with the Commission a very similar complaint in February of 1997. *See* ACC Docket No. T-01051B-97-0117. After the parties reached a settlement agreement in January of 1998, U S WEST unilaterally terminated the agreement in July of 1998. U S WEST's access service has continued to decline through this period, and AT&T again was forced to seek the Commission's intervention. The current Complaint sets forth in detail the extent to which Arizona consumers have been harmed by U S WEST's actions. For the reasons set forth below, the Commission should investigate the Complaint allegations and has the authority to order the relief requested.



### III. ARGUMENT

#### A. THE COMMISSION HAS ASSERTED JURISDICTION OVER THE FACILITIES ADDRESSED IN AT&T'S COMPLAINT

In December 1995, U S WEST filed its Service Quality Plan tariff in response to the Commission's Decision No. 59421 in Docket No. E-1051-93-183. The tariff became effective December 20, 1995. In Section 2.5.4, entitled "Interoffice Trunking," the tariff sets specific engineering design standards for interoffice trunk facilities. By requiring and approving the tariff, the Commission recognized that Arizona consumers are entitled to specific levels of quality for calls using such facilities.

AT&T's Complaint filed in this proceeding specifically alleges unlawful service with regard to both dedicated access facilities and switched access facilities. The switched facilities included within the Complaint have an even more substantial intrastate component than do the dedicated access facilities.

Although U S WEST's present motion is not styled as a motion to dismiss, it essentially seeks this result. U S WEST seeks to preclude the Commission from investigating or enforcing any state law requirements for access services which are priced and ordered under U S WEST's interstate access tariff on file with the Federal Communications Commission ("FCC"). Quite simply, U S WEST asks the Commission to require AT&T to file an amended complaint that excludes all allegations related to access services priced and ordered under its FCC tariff. U S WEST Motion at 4-5. The effect of the motion is to summarily limit the scope of the Commission's jurisdiction and authority to investigate and enforce state law requirements.

U S WEST seeks to insulate itself from this investigation even though the access services priced and ordered under its FCC tariff have definite and substantial intrastate components.

U S WEST does not allege, nor can it, that access services ordered under the FCC tariff do not carry both intrastate and interstate traffic. Because a single access facility carries both interstate and

intrastate traffic, the U S WEST tariffs and FCC determinations set forth a method for choosing which tariff will govern price and ordering. The fact that price and ordering of an access service might be governed by U S WEST's FCC tariff does not make all of the traffic "interstate traffic." To the contrary, both the FCC and Arizona U S WEST tariffs require the application of a "Percent of Interstate Use" or "PIU" factor to ensure pricing will reflect the dual function of the access facility. See U S WEST's Arizona Intrastate Access Service Tariff, §§ 2.3.11 and 2.3.12 (Nov. 11, 1995); U S WEST Tariff F.C.C. No. 5, § 2.3.12 (July 27, 1994).) The PIU factors and tariffs merely reflect the FCC's regulation for apportioning access costs for facilities that carry both interstate and intrastate traffic. 47 C.F.R. § 36.154. Just as the intrastate nature of services is considered for pricing, the Commission must consider the intrastate nature of those services for regulatory and oversight purposes.<sup>1</sup>

The Commission should not ignore its jurisdictional authority to the detriment of Arizona consumers. The Commission should act pursuant to its broad authority to regulate telephone companies to ensure the proper delivery of telecommunications services to the public.<sup>2</sup>

**B. U S WEST HAS CONCEDED COMMISSION JURISDICTION OVER AT LEAST A PORTION OF THE COMPLAINT; JURISDICTIONAL DISPUTES REGARDING REMAINING CLAIMS CAN BE RESOLVED IN THE PROCEEDING**

AT&T believes the Commission has full jurisdiction to grant the relief it has requested in its Complaint. Those arguments are addressed more fully below. Significantly, however, U S WEST's challenges only the Commission's jurisdiction to investigate U S WEST's provision

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<sup>1</sup> "If the customer's estimate of the interstate charges on the bill constitutes more than ten percent of the total charges on that bill, the bill will be provided in accordance with the appropriate interstate rules and regulations specified in the Company's Interstate Access Service Tariff F.C.C. No. 5." U S WEST's Intrastate Access Tariff, § 2.3.12. In other words, the traffic may be 89% intrastate in nature, but the customer is *billed* under the terms of the interstate tariff. U S WEST argues the Commission has no authority over the facilities providing the service, although 89% of the traffic is intrastate.

<sup>2</sup> On September 20, 1999, the Minnesota Public Utilities Commission accepted jurisdiction of AT&T's Complaint filed with the Minnesota Commission. *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service*, Docket No. P-421/C-99-1183, Order Denying Motion, Accepting Jurisdiction, and Initiating Expedited Proceeding (Sept. 20, 1999).

of access services ordered from its FCC tariff. U S WEST's Motion at 3-4. U S WEST does not seek summary judgment with respect to allegations of unlawful and discriminatory provision of intrastate services, nor can it. U S WEST, in essence, concedes that the Commission has jurisdiction to investigate claims which relate to the provision of access service pursuant to its intrastate tariff. Moreover, U S WEST admits that the Complaint does include such allegations. *Id.* at 2. The conclusion is inescapable -- U S WEST concedes the Commission's jurisdiction over a portion of the Complaint.

At this early juncture, the Commission must decide only whether it has jurisdiction to proceed at all. It clearly does. The Commission need not summarily undertake the legal and factual analysis necessary to determine the full scope of the Commission's authority. It cannot be disputed that the transport facilities and access services provided by U S WEST carry both intrastate and interstate traffic. In the end, the Commission may have to consider the relief available regarding specific allegations based on the record evidence developed during the course of the proceeding. Yet, it would be premature and unnecessary at this time to fully insulate U S WEST from Commission investigation into actions which have left Arizona consumers without service.

C. **THE COMMISSION IS NOT PROHIBITED FROM INVESTIGATING HOW U S WEST'S PROVISIONING OF SERVICES THROUGH ITS FCC TARIFF IMPACTS ARIZONA CONSUMERS**

U S WEST argues that access services it provides pursuant to its FCC tariff are solely interstate in nature and within the exclusive oversight of the FCC -- not the Commission. U S WEST further claims the filed rate doctrine prevents the Commission from investigating this Complaint. This reasoning fails on both counts. First, it is not settled as a factual and legal matter that all facilities used to provide the access services *priced* pursuant to U S WEST's interstate tariff are considered "interstate" and subject solely to FCC oversight. Second, the filed rate doctrine restricts only the common law remedies of one who purchases services, not the regulatory oversight

of the Commission. This Commission has a statutory charge and responsibility to investigate these kinds of allegations for the protection of Arizona consumers. This statutory charge is unaffected by U S WEST's arguments.

1. **U S WEST's Assertion that Services Ordered From its FCC Tariff are Exclusively Interstate in Nature is Unsupported**

U S WEST baldly claims, without discussion, that access services provided pursuant to its FCC tariff are exclusively interstate in nature and subject to the exclusive jurisdiction of the FCC. U S WEST's Motion at 3-4. The Commission should not concede its lack of authority over service quality and telecommunications facilities under Arizona law, but instead should allow the record to be fully developed by the parties. First, all of the traffic at issue affects Arizona consumers. Consumers do not differentiate between intrastate and interstate service, and they look to the Commission to ensure they are treated fairly by entities subject to the Commission's jurisdiction in the provisioning of services. It would not be appropriate, especially at this early juncture, for the Commission to summarily abandon that role.

Second, a substantial portion of the traffic carried on the U S WEST access trunks *is* intrastate in nature. Nothing cited by U S WEST compels a finding that the FCC would have exclusive jurisdiction to oversee the provision and quality of those intrastate services. Such a finding would have far-reaching implications and cannot be made on the record currently before the Commission. Furthermore, such an argument also conflicts with the federal Act. 47 U.S.C. § 253(b) explicitly grants the Commission authority to impose requirements necessary "to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

U S WEST relies solely on the fact that some of the services are ordered through its tariff filed at the FCC, but that is not determinative.<sup>3</sup> U S WEST's intrastate and interstate tariffs, and the FCC's determinations, contemplate that trunks will carry both intrastate and interstate traffic. *See* U S WEST Intrastate Access Tariff, §§ 2.3.11 and 2.3.12 (Nov. 20, 1995); U S WEST Tariff F.C.C. No. 5, § 2.3.12 (July 27, 1994). The U S WEST tariffs simply set forth a procedure to determine whether such facilities are ordered and priced under FCC or state tariffs. Even though the facility might be priced and ordered pursuant to a FCC tariff, the pricing requires consideration of the *scope* of the intrastate portion of service provided by application of the PIU factor. *See* U S WEST Tariff F.C.C. No. 5, § 2.3.12 (July 27, 1994). However, when determining what tariff to use to price the service, the fact that both intrastate and interstate traffic is carried on these facilities is not ignored but is a fundamental part of the analysis. U S WEST errs in suggesting that *pricing* through the FCC tariff makes all of the *traffic* "interstate traffic." On the contrary, the facilities that provide both interstate and intrastate access services are located in Arizona and are used to provide services to Arizona consumers, and regulatory oversight and control should reflect that as well. There is simply no legal or factual support to grant the motion for summary judgment submitted by U S WEST.

**2. The Filed Rate Doctrine Limits Common Law Remedies of a Purchaser, Not the Commission's Oversight of U S WEST's Services**

U S WEST's reliance on the filed rate doctrine is merely an attempt to confuse a purchaser's remedies with the Commission's investigation and oversight functions. U S WEST essentially mischaracterizes this proceeding by suggesting it is solely about AT&T's remedies for U S WEST's

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<sup>3</sup> Moreover, the cases cited by U S WEST in its Motion do not support its argument that the FCC has exclusive jurisdiction over all access services purchased out of the FCC tariff. In fact, U S WEST does not cite a single case in support of its strained tariff dichotomy argument. U S WEST cites the following two cases: *North Carolina Utilities Comm'n v. FCC*, 522 F.2d 1036 (4<sup>th</sup> Cir. 1977) *cert. denied*, 434 U.S. 874 (1977) (which address connecting terminal equipment to the interstate network) and *Southwestern Bell Telephone v. FCC*, 153 F.3d 523 (8<sup>th</sup> Cir. 1998) (which address the FCC's regulatory revisions to the local exchange carriers assessment of access costs). Neither case declares that state commissions do not have authority to regulated access to local exchange networks.

poor access services. Yet, this proceeding is of importance to the Commission because Arizona consumers have been left without adequate access service. The Commission must not allow U S WEST to confuse the Commission's broad obligations to protect Arizona consumers with AT&T's legal remedies. An investigation on AT&T's Complaint, for the benefit of Arizona consumers, is fully authorized by law, and unaffected by the filed rate doctrine.

The filed rate doctrine, on which U S WEST bases its entire motion, simply states that tariffed services must be provided and priced consistent with the tariff, and a *purchaser* cannot assert common law claims based on promises outside of the tariff. *AT&T v. Central Office Telephone Inc.*, 118 S. Ct. 1956, 1963 (1998). In *AT&T v. Central Office*, the purchaser sought damages for fraud and breach of contract even though the services were provided and priced consistent with the filed tariff. *Id.* at 1961-62. Ultimately, the Supreme Court held that the purchaser's rights and remedies were governed by *the tariff and applicable statutes*, but that the common law claims were preempted. *Id.* at 1964.

The filed rate doctrine has no importance in this proceeding. AT&T is not seeking monetary recovery pursuant to allegations based on any common law claims. It has filed a Complaint with the Commission and has asked the Commission to investigate alleged violations of Arizona law and tariffs. U S WEST has cited no legal authority to suggest that the filed rate doctrine in any way prevents a state commission from enforcing its own regulatory provisions which by their terms apply to U S WEST. As an example, if U S WEST marketed a service to Arizona consumers at a price of \$15.00 when the tariff price was \$20.00, the filed rate doctrine would allow U S WEST to collect \$20.00 from consumers. The filed rate doctrine would not, however, prevent the Attorney General from invoking consumer protection statutes to investigate and prosecute any false advertising as a violation of Arizona law. It would also not prevent this Commission from ordering U S WEST to stop such practices.

In addition to its vague reference to the filed rate doctrine generally, U S WEST also cites 47 U.S.C. § 203(c) for the proposition that carriers are prohibited from extending preferential treatment outside the scope of the tariff offerings. Apparently, U S WEST's argument is that it is required by federal law to consistently provide inadequate and poor access service to all customers in violation of Arizona laws or it will violate Section 203(c). Upon closer examination, however, it is clear that AT&T's Complaint is consistent with Section 203(c) because it is asking the Commission to stop U S WEST from giving its affiliates and certain customers preferential treatment prohibited by Section 203(a). *See e.g.*, Complaint at ¶¶ 70-78.

AT&T asks only that the Commission investigate alleged violations of Arizona law and tariffs and take appropriate enforcement action upon finding such violations. Nothing argued or cited by U S WEST, including the filed rate doctrine, prevents the Commission from investigating these violations pursuant to its responsibility to protect Arizona consumers.

**D. U S WEST'S REQUEST FOR PARTIAL SUMMARY JUDGMENT FAILS TO MEET THE LEGAL REQUIREMENTS FOR SUCH RELIEF**

Arizona is a "notice pleading" state. *See* Rule 8(a), Az. R. Civ. Pro. AT&T's Complaint meets the requirements of Rule 8(a).<sup>4</sup> AT&T's Complaint provides U S WEST with sufficient notice of the factual and legal bases of the Complaint. Furthermore, as indicated in AT&T's Response to U S WEST's Motion, there are factual and legal bases for the Commission to hear the Complaint and grant AT&T relief.

Rule 56 of the Arizona Rules of Civil Procedure governs summary judgment. It provides, in pertinent part, that summary judgment shall be granted "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Arizona Supreme Court has held that:

The granting of summary judgment is only proper where two prerequisites have been met: first, after examining the entire record there is no genuine dispute as to any material fact and that only one inference can be drawn from the undisputed material facts; second, based upon the undisputed material facts the moving party is entitled to judgment as a matter of law.

Summary judgement is not designed to resolve factual issues nor is it a substitute for trial, even in the interests of the efficient administration of justice. The facts presented to the Court must be viewed in a light most favorable to the opposing motion.

*Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 639 P.2d. 330, 332 (1982) (citations

omitted). The Arizona appellate court has also commented on the legal standards for a motion for a summary judgment:

If there is the slightest doubt as to whether a factual issue remains in dispute, the granting summary judgment is erroneous and such doubt must be resolved in favor of a trial on the merits, and, even if there is no factual dispute, where possible inferences to be drawn from the circumstances are conflicting, summary judgment is unwarranted.

*Morelos v. Morelos*, 129 Ariz. 354, 631 P.2d. 136 (App. 1981) (citations omitted).

U S WEST, in support of its request for partial summary judgment, provides no factual information.<sup>5</sup> The Complaint is the only document upon which U S WEST's bases its Motion. U S WEST has filed no answer or affidavits in support of its Motion that contradict the facts in AT&T's Complaints. In its Motion, U S WEST argues that AT&T's complaint for inadequate access service must include service purchased out of an interstate tariff, and therefore, summary judgment should follow. AT&T has raised sufficient legal and factual justifications for this Commission to exercise jurisdiction over the facilities providing access service and the services themselves.

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<sup>4</sup> AT&T's Complaint also meets the requirements of the Commission's rules. R14-3-106.

<sup>5</sup> In fact, U S WEST already has in its possession the information it seeks from AT&T because the orders for the services were placed with U S WEST. U S WEST was able to determine the information it argues it needs from its own records in an identical Minnesota case. *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service*, Docket No. P421/C-99-1183, Affidavit of Elizabeth Quintana (Sept. 2, 1999). It could have done so in Arizona.



The facilities used to provide the services carry both intrastate and interstate traffic. This is undeniable. The Commission has jurisdiction over intrastate facilities and services, including access. The Commission has jurisdiction over the quality of U S WEST's service, the inadequacy of U S WEST's facilities, the failure of U S WEST to make improvements to its facilities, and the unjust discrimination by U S WEST against certain Arizona customers and communities. *See* Complaint ¶ 3; 47 U.S.C. § 261(b) & (c) (states may enforce existing law or impose new requirements on telecommunications carriers for intrastate service or "exchange access"). Furthermore, the Telecommunications Act of 1996 recognizes that states are not precluded from imposing requirements necessary to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). AT&T's Complaint makes factual allegations that go to each of the issues upon which the Commission has been granted authority under state and federal law. Thus, there exist genuine issues of material fact regardless of the tariff from which AT&T purchases access service.

In short, U S WEST has failed to meet the legal requirements for summary judgment. Therefore, U S WEST's summary judgment request must be denied.

**E. THE MOTION FOR EXTENSION TO ANSWER SHOULD BE DENIED**

U S WEST, without any supporting arguments, requests an extension of time to answer AT&T's Complaint until 10 days after the Commission decides U S WEST motions. U S WEST's Motion should be denied.

AT&T filed nearly identical complaints in a number of states in U S WEST's region. In Minnesota, U S WEST was able to answer the complaint filed by AT&T. U S WEST was also able to determine from its own records the held orders that were ordered out of U S WEST's interstate


tariff.<sup>6</sup> Furthermore, AT&T is not raising any claims under federal law. All claims raised by AT&T are supported by Arizona law and U S WEST's Service Quality Plan tariff. Therefore, U S WEST's request for an extension is unnecessary and simply a means to delay filing its answer. U S WEST should be ordered to file its answer immediately.

#### IV. CONCLUSION

For the above reasons, AT&T respectfully requests that the Commission deny U S WEST's Motion.

Respectfully submitted,

AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC.

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<sup>6</sup> *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service, Docket No. P421/C-99-1183. See Affidavit of Elizabeth Quintana (Sept. 2, 1999).*

### CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T's Response to U S WEST's Motion for More Definitive Statement, Motion for Extension, and in the Alternative, Motion for Partial Summary Judgement in Docket No. T-01051B-99-0476, were sent via overnight delivery this 29th day of September, 1999 to:

Arizona Corporation Commission  
Docket Control  
1200 West Washington Street  
Phoenix, AZ 85007

and that a true and correct copy of the foregoing was sent via overnight delivery this 29th day of September, 1999 to the following:

Carl J. Kunasek, Chairman  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

Jerry Porter  
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and a true and correct copy was sent via United States Mail, postage prepaid, this 29th day of September, 1999 to the following:

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## **ATTACHMENT B**

BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK  
Chairman  
JAMES M. IRVIN  
Commissioner  
WILLIAM A. MUNDELL  
Commissioner

IN THE MATTER OF THE COMPLAINT  
OF AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC. AGAINST  
U S WEST COMMUNICATIONS, INC.  
REGARDING ACCESS SERVICE

) DOCKET NO. T-02428A-99-0476  
) T-01051B-99-0476  
)

) AT&T'S RESPONSE TO U S WEST'S  
) MOTION TO STAY PROCEEDING,  
) OR IN THE ALTERNATIVE, TO  
) SEVER CLAIMS  
)  
)

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby submits its response to U S WEST Communications, Inc.'s ("U S WEST") Motion to Stay Proceeding Pending FCC Decision on Preemption, or in the Alternative, to Sever Claims Relating to Interstate Services ("U S WEST's Motion"). AT&T requests that the Arizona Corporation Commission ("Commission") deny U S WEST's Motion. In support thereof, AT&T states the following.

**I. INTRODUCTION**

This case is about service quality. AT&T seeks relief under Arizona state statutes from the problems it has been experiencing as a customer of U S WEST's access services. The Complaint concerns service and facilities ordered from U S WEST to enable AT&T to provide service to AT&T's Arizona customers. AT&T's Complaint outlines U S WEST's failures regarding access service, including: (1) an unwillingness to provide facilities necessary for access services; (2) an unwillingness to timely provision facilities; (3) practices that favor itself, its affiliates and its own customers; and (4)

maintaining unreasonable differences as to access services between localities and classes of services when deciding where to provision facilities. AT&T also alleges that U S WEST fails to comply with the Service Quality Plan tariff.

U S WEST's conduct, as described in the Complaint, violates Arizona statutes and tariffs. *See* AT&T's Complaint ¶¶ 61-83. AT&T asks the Commission in this proceeding to investigate U S WEST's service quality with regard to its access services under the authority of these statutes and to provide relief by ordering U S WEST to (1) comply with its tariffs; (2) immediately fill all outstanding held orders; (3) provide just, adequate, efficient and reasonable access facilities; (4) cease granting preferences to itself and its affiliates; (5) cease its practice of maintaining unreasonable differences between its wholesale and retail customers; (6) cease its practice of maintaining unreasonable as to service and facilities between localities; and (7) file several monthly reports with the Commission and AT&T informing them of the status of its provision of service and its plans to remedy problems in a timely manner. *See* AT&T's Complaint, Prayer for Relief. To address the discrimination issues, AT&T also asks the Commission to require U S WEST to inform the Commission in monthly reports of its performance in providing service to itself and its affiliates as compared to its provision of service to AT&T and other interexchange carriers.

U S WEST now asks the Commission to stay the proceeding pending a decision by the Federal Communications Commission ("FCC") on U S WEST's Petition for Declaratory Ruling. In the alternative, U S WEST seeks to preclude the Commission from investigating or enforcing any of the above state law requirements for access services which are ordered out of U S WEST's interstate access tariff on file with the

FCC (U S WEST's FCC Tariff No. 5). By seeking to sever issues of service quality for facilities used in Arizona but ordered out of the interstate tariff, U S WEST further asks the Commission to preclude from evidence at the hearing any information concerning services or facilities ordered from U S WEST's FCC tariff.

In essence, U S WEST asks the Commission to reshape AT&T's Complaint by excising all allegations and evidence related to access services ordered under its FCC tariff. This is merely an attempt by U S WEST to suggest to this Commission that its problems with the provision of access services here in Arizona are not as serious as they are. The effect of the motion is to summarily limit the scope of the Commission's jurisdiction and authority to investigate and enforce state law requirements relating to the quality of service provided by U S WEST to the consumers of the state of Arizona.

For the reasons that follow, AT&T asks the Commission to reject U S WEST's Motion, to find instead that it has jurisdiction to consider the totality of AT&T's Complaint, and to provide the relief AT&T requests.

## **II. ARGUMENT**

The Commission has jurisdiction to investigate and resolve complaints over the reasonableness and adequacy of U S WEST's access services and facilities, the refusal of U S WEST to provide access facilities, and the unjust discrimination of U S WEST against certain Arizona wholesale customers and in favor of itself or its affiliates.

AT&T's Complaint filed in this proceeding is nearly identical to the Complaint filed in 1997. The only difference between the two proceedings is that the 1997 Complaint involved only dedicated access facilities, whereas this Complaint specifically alleges unlawful service with regard to both dedicated access facilities and switched



access facilities. (See Complaint, ¶¶ 4, 5, and 7.) As detailed in AT&T's Complaint, U S WEST unilaterally terminated the settlement agreement that the parties reached in the previous case and consequently has forced AT&T to bring yet another complaint here in Arizona to obtain the quality of service that it needs and is lawfully entitled to. The Commission should continue to exercise its jurisdiction over AT&T's claims.

The Commission already exercises jurisdiction over the service quality of essentially the same services purchased by U S WEST's retail customers. This action simply asks the Commission to provide AT&T with essentially the same service quality protections that this Commission affords U S WEST's Arizona end users. A.R.S. § 40-334(B) specifically prohibits discrimination between classes of customers. It would be discriminatory for the Commission to decline to exercise its jurisdiction over the same services provided by U S WEST to interexchange carriers like AT&T in Arizona.

U S WEST argues that the Commission's authority over service quality stops, however, at the point where AT&T's claims rest on services it ordered out of the FCC tariff. This should not persuade this Commission to change its mind about the scope of its jurisdiction. First, the scope of the Commission's investigative authority under A.R.S. §§ 40-202, 40-203, 40-321 and 40-331 is extremely broad. The language of these statutes is not limited to those services provided by a telephone company pursuant to its intrastate tariffs.

Second, U S WEST's argument conflicts with federal law. The federal Telecommunications Act of 1996 grants state commissions authority to impose requirements necessary "to protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers." 47

U.S.C. § 253(b). A.R.S. § 40-321 permits the Commission to determine "just, reasonable, safe, proper, adequate or sufficient" facilities and service. A.R.S. § 40-331 also provides the Commission with authority to order additions or improvements, or changes to existing plant, that might reasonably be made to provide the security and convenience to the public. Therefore, AT&T's claims are proper under both federal and state law.

More importantly, the fact that the access service might be ordered under U S WEST's FCC tariff does not make all of the traffic provided by that service "interstate traffic." A single access facility carries both intrastate and interstate traffic. Both the FCC and Arizona tariffs of U S WEST require the application of a "Percent of Interstate Use" or "PIU" factor to ensure pricing will reflect the dual function of the access facility. *See* U S WEST's Arizona Access Tariff, §§ 2.3.11-2.3.12 (Nov. 11, 1995); U S WEST's FCC Tariff No. 5, § 2.3.12 (July 27, 1994). The PIU factors and tariffs merely reflect the FCC's regulation for apportioning access costs for facilities which carry both interstate and intrastate traffic. 47 C.F.R. § 36.154.

In other words, even if the traffic is 89% intrastate in nature, the customer is nonetheless billed under the terms of the interstate tariff. U S WEST argues the Commission has no authority over the facilities providing the service, although 89% of the traffic is intrastate. In fact, in 1997 and 1998, AT&T paid U S WEST a significant amount of money for intrastate access services in Arizona. Just as the intrastate nature of services is considered for pricing, the Commission must consider the intrastate nature of those services for regulatory and oversight purposes. The PIU factor defeats U S WEST's argument that this Commission has no jurisdiction over facilities and services purchased

out of its FCC tariff, or should ignore these services and facilities when reviewing AT&T's Complaint.

Furthermore, U S WEST's argument that this Commission should not consider in its investigation those services and facilities ordered by AT&T under its FCC tariff is premised on false presumption that AT&T's claims are tied to the specific "held" and "missed" orders that are listed on the Exhibits produced in response to U S WEST's Motion for More Definite Statement. The Commission should refuse U S WEST's attempt to myopically focus on the particular held orders listed in AT&T's response to the Motion for More Definite Statement. From AT&T's perspective, this case is not tied to treatment by U S WEST of the particular list of AT&T's held orders, but instead is an attempt to obtain relief from recurring service problems AT&T experiences with U S WEST access services. The "held orders" and "missed orders" that AT&T references in its Complaint are only examples of the continuing service problem. Certainly AT&T is asking the Commission to order U S WEST to fill those held orders that continue to be outstanding. More importantly, however, AT&T is here to ask the Commission to help resolve the ongoing service problem.

AT&T has filed similar complaints in Washington, Colorado, Minnesota and New Mexico. No state commission to date has agreed with U S WEST's arguments limiting state commission jurisdiction over access service quality. A preliminary ruling from the Commission Hearing Division indicates that Commission agrees that it has jurisdiction over in-state service quality issues:

The filed rate doctrine does not preempt the Commission's jurisdiction in this matter. Contrary to the claims of U S WEST, through the Tariff, the Commission has imposed terms and conditions for the provision of

service, and penalties if the conditions were not met. Furthermore, in addition to the provision in the Tariff cited by AT&T, Section 2.4.2.A, in relevant part provides:

'Basic Service Standard

As part of its obligation to provide adequate basic telephone service, the Company shall construct and maintain its telecommunications network so that the instrumentalities, equipment, and facilities within the network shall be adequate, efficient, just and reasonable in all respects in order to provide each customer within its service area with the following services or capabilities:

5. Access to toll services'

Procedural Order (Oct. 20, 1999) at 3.

The filed rate doctrine, on which U S WEST relies on in its Petition for Declaratory Ruling at the FCC and relied on in its Motion for More Definite Statement, Motion for Extension, and in the Alternative, Motion for Partial Summary Judgement,<sup>1</sup> simply states that tariffed services must be provided and priced consistent with the tariff. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S.Ct. 1956, 1963 (1998). The doctrine restricts only the common law remedies of customers that purchase services under tariffs, and it seeks primarily to protect against unreasonable and discriminatory charges. *Id.* at 1962. In fact, the *Central Office* case simply rejected contract and tort claims that would have granted preferential treatment to Central Office. AT&T has brought neither contract nor tort claims against U S WEST. Moreover, AT&T does not seek preferential treatment. Rather, AT&T asks the Commission to require U S WEST to comply with its tariffs and to provide services and facilities in accordance with Arizona state statutes that govern telephone companies.

The United States Supreme Court, in the *Central Office* case, held that a purchaser's rights and remedies are governed by statute and tariff, not common law. *Id.*

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<sup>1</sup> See AT&T's Response to U S West's Motion, at 7-9.

at 1964. AT&T's Complaint falls squarely within Arizona statutory requirements and Commission rules. It would be quite an anomaly if a carrier could—through its tariffs—indemnify itself against regulatory oversight and all violations of the laws in the State of Arizona.

Two other state commissions that considered this argument by U S WEST expressly rejected it and found that *Central Office* did not preclude them from exercising jurisdiction over the service quality of services.

In Washington, the Commission found, in pertinent part:

We do not believe that the Supreme Court's *Central Office* decision as to the filed-rate doctrine speaks to or controls the decision we make. Among other considerations, the plaintiff there was a private citizen and a customer under the tariff, not another agency of government with regulatory responsibilities that are specifically preserved in federal law. The matters litigated in that proceeding involved financial aspects of the service, and such matters are appropriate for inclusion in tariffs. The filed-rate doctrine addresses common-law remedies. The cited decision simply did not address the question we face.

The Commission in the past has examined a similar "10% rule" and billing by competitive access providers selling unswitched interstate and intrastate services exclusively pursuant to a federal tariff. The Commission found that telecommunications companies offering intrastate service were not exempt from registering with the Commission despite offering services exclusively under federal pricing regulation.

This is consistent with Section 2(b) of the Communications Act of 1934. With certain irrelevant exceptions, that section says that nothing in the Communications Act of 1934 shall be construed to give the FCC jurisdiction over charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service.<sup>2</sup>

The FCC has not in any way clearly provided that it preempts state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the "ten percent rule" preempts all state regulatory authority, we decline to so rule. We do expect that the

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<sup>2</sup> Section 2(b) of the Communications Act of 1934, Ch. 652, Title I, Sec. 2(b), 48 Stat 1064, codified as amended at 47 U.S.C. Sec/ 152(b)(1994).

evidence will demonstrate a sufficient volume of intrastate traffic to warrant our proceeding to a decision on the issues presented.

*Order Denying Motion to Dismiss*, Washington Utilities and Transportation Commission, =

Docket No. UT-991292 (November 12, 1999) at pp. 4-5. Similarly, the Colorado

Commission found:

U S WEST's primary claim is that the Federal Communications Commission ("FCC") has exclusive jurisdiction over most of the held service orders since all but one or two of them were purchased by AT&T out of U S WEST's federal tariff. U S WEST cites the case of *AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S.Ct. 1956 (1998). AT&T opposes the motion suggesting that the FCC's jurisdiction is not exclusive. In addition, AT&T notes that summary judgment is a drastic remedy, to be provided only when there are no genuine issue of material fact.

The ALJ's review of the Supreme Court's decision in the *Central Office Telephone* case does not support granting the Motion for Summary Judgment at this time. The *Central Office Telephone* involved a plaintiff asserting claims for a breach of promises for subjects covered in tariffs, but the promises were for things different than specified in the tariff, e.g., faster response than called for in a tariff. In this proceeding, AT&T has alleged many things, including refusal to construct facilities and refusal to provision sufficient equipment, and failure to make timely additions to the network which are not tied to a specific held order. These claims do not necessarily arise specifically from the federal tariff and are thus not within the purview of the *Central Office Telephone* case. In addition, U S WEST has cited no case for the proposition that this Commission may not use federal tariffs as guidance in conjunction with evaluating claims of inadequate service under State law.

There is a difference between primary jurisdiction and exclusive jurisdiction as well. For example, this Commission has held that the primary jurisdiction for interpreting certificates of public convenience and necessity previously issued by the Interstate Commerce Commission, now issued by the Federal Highway Administration, is in the federal realm. However, in appropriate circumstances this Commission interprets those certificates in determining whether a carrier is complying with Federal and/or State law. (citations omitted)

Finally, there remain genuine issues of material fact as to what actions U S WEST is taking or not taking in the provision of access services which are within the realm of the complaint. There are also issues of fact

as to the nature of the traffic to be transported on the circuits. Therefore, it is inappropriate to grant summary judgment and the motion is denied.

*Interim Order of Administrative Law Judge Ken F. Kirkpatrick Establishing Procedures,* Colorado Public Utilities Commission, Docket No. 99F-404T (November 15, 1999) at pp.4-5.

All that AT&T seeks in its Complaint is for the Arizona Commission to investigate U S WEST's violations of Arizona law and take the appropriate enforcement action upon finding such violations. The Commission, in fact, has a constitutional and statutory obligation to do just that regardless of the tariff governing the service.

U S WEST also requests that the Commission sever all claims relating to services and facilities purchased by AT&T under U S WEST's FCC tariff. The Commission should deny this request. U S WEST's severance argument is based on the same reasoning as its jurisdictional argument. Just as the Commission has jurisdiction to regulate the quality of services purchased out of U S WEST's FCC tariff, the Commission should consider information relating to those services to determine whether a problem exists, and what, if anything to do about it. This evidence is relevant to the issues before the Commission concerning the quality of U S WEST's access services provided to Arizona customers like AT&T.

### **III. CONCLUSION**

For the foregoing reasons, AT&T requests that the Commission deny U S WEST's Motion for a Stay. For the same reasons, the Commission should also deny U S WEST's request to sever claims regarding services or facilities purchased from U S WEST's tariff on file with the FCC.

Respectfully submitted this 3<sup>rd</sup> day of January, 2000.

**AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC.**

By:



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## CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T's Response to U S WEST's Motion to Stay Proceeding, or in the Alternative, to Sever Claims in Docket No. T-01051B-99-0476, were sent via overnight delivery this 3rd day of January, 2000 to:

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and that a true and correct copy of the foregoing was sent via overnight delivery this 3rd day of January, 2000 to the following:

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## CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T's Response to U S WEST's Renewed Motion to Stay in Docket No. T-01051B-99-0476, were sent via overnight delivery this 12th day of April, 2000 to:

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